



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11864

Hearing Date: November 30, 2022

Decision Issued: December 20, 2022

PROCEDURAL HISTORY

On June 24, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

1-Attendance/Excessive Tardiness 2-Leaving work without permission' 14-Safety Violation 35-Abuse of State Time 37-Disruptive Behavior 39-Violation of Policy 2.35, Civility in the Workplace 56-Insubordination 74-Falsifying Records 77-Damaging State Property or Records.¹

On July 5, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 25, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 30, 2022, a hearing was held by remote conference.

APPEARANCES

Grievant
University Party Designee
University Representative

¹ Not all of the alleged offenses rose to the level of a Group III offense. Several of the offenses involved separate and distinct factual scenarios. A better practice would have been for the University to issue more than one written notice.

Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the University to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

George Mason University employed Grievant as a Store & Warehouse Specialist III. His duties included moving furniture and other items as well as performing other duties as assigned. He began working for the University in 2019.

On January 29, 2021, Grievant was responsible for assisting Ms. P by moving files from one location to another. When the files arrived at the new location, they were broken and the drawers no longer worked.

On September 15, 2021, Grievant was assigned responsibility for a 2009 Ford Econoline which required diesel fuel. Grievant filled the truck with unleaded gasoline. The University had to make extensive repairs to the truck including removing and cleaning the tank, flushing all lines, replace the fuel pump, replace filters, change engine oil, replace O-rings, and replace oil pressure sending unit.

As of September 30, 2021, Grievant had three hours of "Unpaid leave, (LWOP-Dock). His VDSP sick leave balance was zero.

On September 30, 2021, Grievant received a Performance Counseling advising him that he was expected to work onsite from 7 a.m. until 3:30 p.m. with a half hour lunch break. He was told to work his full shift. He was advised to be mindful of his current leave without pay status. He was told to work with his manager, supervisor and coworkers in a respectful way and demonstrate respect towards clients, coworkers, supervisors, and managers.

Grievant was scheduled to work on October 25, 2021. Grievant felt ill and notified the Supervisor that he would not report to work that day. Grievant did not have any available sick leave balance.

As of March 31, 2022, Grievant's leave reserve status was leave without pay. His work shift was scheduled to end at 3:30 p.m. On April 6, 2022, Grievant left work at 3:16 p.m. He did not text or call the Supervisor before leaving. On April 7, 2022, Grievant left work at 3:04 p.m. He did not text or call the Supervisor before leaving. On April 8, 2022, Grievant left work at 3:16 p.m. He did not text or call the Supervisor before leaving. Grievant also left early during the week of April 11, 2022 through April 13, 2022 and the week of April 18, 2022 through April 22, 2022.

During the week of May 9, 2022, Grievant was assigned to work with Mr. B who supervised recycling and waste management activities. Grievant spent two or three days crushing cardboard. In the following week, Grievant was assigned responsibility to assist the Comingle truck staff with collecting items from the campus housing area and sorting at the facilities yard. Grievant refused to perform the work. Grievant told Mr. B he should not be asked to do the job since he was only in Mr. B's shop to help. Mr. B told Grievant the tasks was not unreasonable and Grievant could not decide what jobs he would do. Grievant began performing the work. On the following day, Mr. B returned Grievant to crushing cardboard. Grievant objected to being moved back to crushing boxes because he felt the number of bin left behind on the prior day was done intentionally and he should not be required to crush cardboard left from the prior day. Mr. B explained to Grievant that Mr. B was the one who assigned the job to him and the rest of the staff, Grievant said he could not crush all the bins after he worked hard the week before. Grievant began to crush cardboard but Mr. B's staff told Mr. B that they had no bins to take out and replace. Mr. B spoke with Grievant about the lack of empty bins. Grievant stated he was not able to do the cardboard the same like last week because he saw how the other guys worked so he was going to do the same. By the end of the shift, Grievant had just as many full cardboard bins as he started with at the beginning of the shift showing he had done little work.

The following day, Mr. B moved Grievant back to Comingle. Grievant told Mr. B he was just a helper and should not be used as a normal or primary worker. Grievant expressed concerns about the contents of the comingle and how it was contaminated.

Grievant expressed concerns about glass and other sharp items being in the waste stream that were supposed to be cans and plastic only. Mr. B advised Grievant of all the personal protective equipment he could use such as Rubber Gloves, Cloth Gloves, Safety Glasses, Tyvek Suite, etc. After repeated conversations regarding the work, Grievant decided that he could not perform the job being asked of him. Mr. B told the Manager that he could no longer use Grievant in Mr. B's department because Grievant saw himself only as a helper.

Grievant sometimes had to work with Mr. Bo. Grievant was often disrespectful and abrasive in his interaction with Mr. Bo. Mr. Bo filed a complaint against Grievant because Grievant treated him one way and treated others differently. On June 8, 2022, Grievant and Mr. Bo began a conversation. Mr. Bo said he did not know what was going on with Grievant. Grievant said, "I wouldn't say that sh-t outside of work," which Mr. Bo perceived as a threat. Grievant caused Mr. Bo to become so upset that Mr. Bo could no longer work with Grievant anymore. Mr. Bo complained to the Manager who sent him home for the day.

In 2022, Grievant referred to the Supervisor as "Boss Hog."

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Group I offenses include: poor attendance; abuse of state time; use of obscene or disrespectful language; disruptive behavior; and unsatisfactory work performance. Group II offenses include leaving work without permission.

None of Grievant's behavior individually rises to the level of a Group III Offense. The University could have followed a better practice and issued separate written notices and justified Grievant's removal based on the accumulation of disciplinary action. DHRM Policy 1.60, however, provides, "Agencies may also address multiple offenses through the issuance of one or more Written Notice." In this case, the University has established that Grievant abused State time on multiple occasions by leaving work early. He did so without asking permission and without having available leave balances. His behavior was disruptive by upsetting Mr. Bo and calling the Supervisor "Boss Hog" instead of his name. Grievant's work performance was unsatisfactory because he filled a truck with unleaded gas when he knew or should have known that the truck was designed to be filled only

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

with diesel fuel. Grievant refused to fully perform his assigned duties when working in Mr. B's unit. Based on these multiple offenses, the University has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the University's decision to remove Grievant must be upheld.

Grievant denied filling the truck with unleaded gasoline instead of diesel. The Agency presented a Voyager fuel card showing Grievant as the one who pumped the unleaded gas into the truck.

Grievant denied that his interactions with Mr. Bo were inappropriate. Mr. Bo's testimony was credible and it is clear Grievant's behavior towards Mr. Bo was abrasive.

Grievant argued he performed his duties when working in Mr. B's unit. Mr. B's testimony was credible and it showed that Grievant was not actively involved in performing duties. He was resistant and slow to complete the duties. Grievant did not establish any medical or other reason why he could not perform the work duties assigned by Mr. B.

Grievant argued he was racially profiled or "it was personal." No credible evidence was presented to support this allegation. Grievant did not testify. The University took disciplinary action against Grievant based on his behavior.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"³ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

³ Va. Code § 2.2-3005.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.